MCAR, Inc. *and* American Federation of State, County and Municipal Employees, District Council 85, AFL–CIO. Case 6–CA–30300

April 24, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, HURTGEN, AND WALSH

On January 13, 2000, Administrative Law Judge Martin J. Linsky issued the attached bench decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order as modified.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, MCAR, Inc., Hermitage, Pennsylvania, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(a).

"(a) Refusing to bargain in good faith with the American Federation of State, County and Municipal Employees, District Council 85, AFL–CIO, as the exclusive bargaining representative of the employees in the bargaining unit described below, as clarified by the decision in Case 6–UC–397 to include the position of production technician:

> All full-time and regular part-time nonprofessional employees, including Accounts Receivable/Payable Technicians, Crew Leaders, Drivers, Fiscal Assistants, Floor Supervisors, Floor Supervisors II (Food Service, Furniture Shop, Pallet Shop), In-Home Residential Aides, Individual Specialized Program Implementers, Job Coaches, Maintenance Technicians, OBRA Companions, Production Technician, Receptionists and Residential Workers, employed by the employer at its Hermitage, Pennsylvania and Greenville, Pennsylvania facilities; excluding all management employees, confidential employees and guards, professional employees and supervisors as defined by the Act."

2. Substitute the following for paragraph 2(b).

"(b) Within 14 days after service by the Region, post at its facility in Hermitage, Pennsylvania, copies of the attached notice marked 'Appendix D.'[2] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 18, 1999."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX D

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain in good faith with the American Federation of State, County and Municipal Employees, District Council 85, AFL–CIO as the exclusive bargaining representative of the employees in the bargaining unit described below, which now includes the

[1] The judge concluded that the Board's holding in the earlier unit clarification proceeding, Case 6–UC–397, was res judicata in regard to the issue of the Board's jurisdiction over the Respondent. In that unit clarification proceeding, Member Hurtgen dissented from the Board's denial of review of the Regional Director's holding that the Board should assert jurisdiction. He agrees, however, that nothing new has been presented in this proceeding and accordingly, for institutional reasons, he joins in the assertion of jurisdiction.

[2] We shall modify the judge's recommended Order to include a description of the bargaining unit. Also, in accordance with *Excel Container, Inc*., 325 NLRB 17 (1997), we shall change the date in par. 2(b) of the recommended Order from July 1, 1998, to January 18, 1999, the approximate date of the unfair labor practice.

production technician position, pursuant to Case 6-UC-397:

> All full-time and regular part-time nonprofessional employees, including Accounts Receivable/Payable Technicians, Crew Leaders, Drivers, Fiscal Assistants, Floor Supervisors, Floor Supervisors II (Food Service, Furniture Shop, Pallet Shop), In-Home Residential Aides, Individual Specialized Program Implementers, Job Coaches, Maintenance Technicians, OBRA Companions, Production Technician, Receptionists and Residential Workers, employed by the employer at its Hermitage, Pennsylvania and Greenville, Pennsylvania facilities; excluding all management employees, confidential employees and guards, professional employees and supervisors as defined by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request by the Union, bargain in good faith concerning wages, hours, and other terms and conditions of employment of the employees in the bargaining unit which includes the position of production technician.

MCAR, INC.

Gerald McKinney, Esq., for the General Counsel.
Albert S. Lee, Esq., of Pittsburgh, Pennsylvania, for the Respondent.
Eric M. Fink, Esq., of Philadelphia, Pennsylvania, for the Charging Party.

BENCH DECISION AND CERTIFICATION

MARTIN J. LINSKY, Administrative Law Judge. This case was tried in Youngstown, Ohio, on December 7, 1999. At the conclusion of the trial and following oral argument by counsel for the General Counsel, counsel for the Charging Party, and counsel for Respondent, I issued a bench decision pursuant to Section 102.35(a)(10) of the Board's Rules and Regulations, setting forth findings of fact and conclusions of law. In accordance with Section 102.45 of the Board's Rules and Regulations, I certify the accuracy of, and attach hereto as "Appendix A," the portion of the transcript containing that decision. I have corrected, sua sponte, certain obvious errors in the transcript. As noted in my bench decision I will attach as "Appendix B" the Regional Director's Decision, Order, and Clarification of Bargaining Unit in Case 6–UC–397, and as "Appendix C" the Board's Order denying review of the Regional Director's decision in Case 6–UC–397. In addition, because the remedy, Order, and notice to employees were delivered orally in summary fashion, those sections of the bench decision shall be set forth more fully below.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act, including the posting of a notice to employees attached here as "Appendix D."

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[1]

ORDER

The Respondent, MCAR, Inc., Hermitage, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with the bargaining unit represented by the Union as clarified by the decision in 6–UC–397, i.e., the unit should include the position of production technician.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Upon request by the Union bargain in good faith with the Union concerning hours, wages, and other terms and conditions of employment of the employees in the clarified bargaining unit which includes the position of production technician.

(b) Within 14 days after service by the Region post at its facility in Hermitage, Pennsylvania, and all places where notices customarily are posted copies of the attached notice marked "Appendix D."[2] Copies of the notice, on forms provided by the Regional Director for Region 6, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 1,1998.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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[1] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.

[2] If this Order is enforced by a Judgment of the United States court of appeals, the words in the notice "Posted By Order Of The National Labor Relations Board" shall read "Posted Pursuant To A Judgment Of The United States Court Of Appeals Enforcing An Order Of The National Labor Relations Board."

APPENDIX A

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JUDGE LINSKY: On the record. Okay. As I indicated, I will be issuing a bench decision in this case. And I will reading the decision into the record.

And then when I get the transcript, as you probably know the routine, I will be certifying that part of the transcript which contains my decision.

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And I will be issuing an order, a notice in this case and an order, and they will be more fully spelled out in the—in the bench decision and certification order that I will be issuing.

And Counsel will be getting copies of that and of course will have the right to take exception to it and go to the Board or let it become final Board action and take it somewhere else if they deem that appropriate.

Judge's Bench Decision

In any event, on January 25th, 1999, and on March 24th, 1999, a charge and an amended charge were filed with Region 6 of the National Labor Relations Board in a case entitled 6–CA–30300.

The Charging Party was The American Federation of State, County and Municipal Employees, District Council Number 85, AFL–CIO. The Charged Party or Respondent is MCAR, Inc.

On the 30th of April, 1999, The National Labor Relations Board, by the Regional Director for Region 6, issued an Amended Complaint, which I'll refer to as the complaint, hereafter, which alleges that the Respondent, MCAR, Inc., violated Section 8a-1 and 5 of the National Labor Relations Act by unlawfully refusing a request to bargain with the Union concerning a clarified unit of employees represented by the Union.

Okay. The Respondent, MCAR, at all material times, has been a not-for-profit corporation with an office and facilities in Hermitage, Pennsylvania, where it operates a community residential and rehabilitation services for mentally retarded and developmentally disabled persons.

MCAR has admitted that it meets the financial jurisdictional standards of the Board. In addition, the Respondent has admitted that it's an employer engaged in commerce within the meaning of the Act and is a healthcare institution within the meaning of the Act, and also has admitted that the Union is a labor organization within the meaning of the Act.

However, the Respondent takes the position that the National Labor Relations Board should not exercise jurisdiction over it because

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traditionally it has been that the Board has declined jurisdiction and in addition the jurisdiction has been exercised, I guess, by the Pennsylvania Labor Relations Board.

In any event, some time ago there was a petition to clarify a unit of nonprofessional employees that worked for the Respondent. And in connection with that Petition to Clarify the Unit, there was a hearing held. And there was a decision issued by the Regional Director for Region 6, in a case headed, Number 6–UC–397.

Sufficive to say, the Board in that case did two—the Region, pardon me, did two things. It said that the Board would now exercise jurisdiction over the Respondent, because there had been a change in Board Law, and this is more fully spelled out in the Regional Director's decision which will be attached as an appendix to my decision when I certify it to the Board.

In any event, and in addition, the Regional Director concluded that the unit of nonprofessional employees that worked for the Respondent should be clarified, changed, and that the position of production technician should be added to the persons in that unit.

The Respondent sought review of that decision by the—by the Board, the National Labor Relations Board itself in Washington, D.C. And the Board affirmed—denied review, in affect affirming the decision of the Regional Director.

The Regional Director's Decision was dated on September 11th, 1998, which said that the Board would assert jurisdiction and that the production technician should be in the nonprofessional unit of employees represented by the Union who work for Respondent.

And the Board's decision, with one member dissenting, is dated October 28, 1998. And the majority of the Board affirmed the decision of the Region.

We were here today for a hearing. Essentially we had four witnesses. For the General Counsel, Sheila Doddo and Ed Scurry testified. I found both Ms. Doddo and Mr. Scurry to be very credible witnesses. And I credit their testimony in its entirety.

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The Respondent had two witnesses also. And Mr. Robert Beach and Mr. David Ferand. Robert Beach being the CEO of the Respondent, and David Ferand being the individual who actually occupies the position of production technician. I found both of those witnesses to be very credible and honest as well.

So with respect to whether or not there were any major credibility differences, I don't think there were. I think I found all four witnesses to be extremely honest and forthcoming and candid. Now that doesn't mean I agree with every conclusion that they may want me to draw, I don't. But I found all four credible.

Sufficive to say, after the unit was clarified by the Regional Director's Decision, affirmed by the Board, the Union made a request to bargain with the unit as clarified, namely to bargain about the production technician.

Requests to bargain were made by Ms. Doddo on January the 8th, 1999 and January 21st, 1999. And the answer to Ms. Doddo was a handwritten response from Respondent's Director of Human Resources, to the effect that MCAR does—quote "MCAR does not intend to comply with NLRB Decision insofar as we feel it is wrong," end quote.

In addition, Mr. Scurry sent a letter requesting bargaining to Mr. Beach, and again there was no bargaining. So there is no question about the fact that there was a request to bargain about the unit as clarified and MCAR refused to bargain.

And they assert basically two defenses, One is jurisdiction, that the NLRB should not assert jurisdiction in this case. As far

as that issue is concerned, that is res judicata, as far as I'm concerned. And therefore, I'm not going to disturb that decision.

The second, this item about which Respondent contests the decision, and why it refuses to bargain is because they feel the Board was wrong and that the production technician is a statutory supervisor within the meaning of the National Labor Relations Act and therefore should not be in this unit.

The one way that the Respondent could proceed, of course, would

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be to file a UC petition and ask the Board again to clarify the unit, that based on new facts that this production technician really doesn't belong in the unit. Respondent chose not to go that route.

Another route, since the decision of the Board on the unit clarification issue was not appealable directly to the Court of Appeals, the only way to get it to the Court of Appeals is to have a finding, really, that Respondent violated Section 8a-5 of the Act in order to have—and committed an unfair labor practice, in order to have a decision which the Respondent can appeal to a Court of Appeals, more than likely the Third Circuit, but not necessarily the Third Circuit.

In any event, on the question of statutory supervisor, I must find that I agree with Mr. McKinney who in his closing argument thought that the evidence we heard today on that issue was cumulative, basically, as to what the production technician does, cumulative in the sense that it was really essentially regurgitating what was laid out as testimony in the UC hearing.

And I think with—I agree with Mr. McKinney that the production technician position is like a lead man, and in any—more than—and is not a statutory supervisor.

I permitted the Respondent to put forth evidence on the—on exactly what the production technician does, not so much to give them another bite at the apple, as Mr. Fink has suggested, although it may look like that, but because there could be changed circumstances since the hearing in August of 1998, and in fact the production technician does indeed have authority that would make him a statutory supervisor, in my—in my opinion the new evidence doesn't rise to that level.

With respect to handling grievances—and I'll only devote my attention now to the stuff that would really show or might show supervisory status. With respect to the processing of grievances, Mr. Ferand testified that he only sat in on one, and he sat in as a witness.

With respect to hiring, which is a major factor in deciding if someone is a statutory supervisor, I find that we don't have a heck of a lot more than was presented back in August at the UC hearing.

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And I'll just quote a part from the Regional Director's Decision in the UC case, quote, "With regard to the Employer's hiring process, while Ferand was asked to sit in on one interview, one job interview, this related to an applicant for a job in another department. And there was no evidence that Ferand's opinion was considered in the decision making with regard to that applicant."

Then there is a footnote that states, quote, "In fact, the record indicates that a decision has not yet been made with regard to that applicant. The interview in which Ferand took part was only the first of three interviews conducted before a decision is made on the applicant." That's the end of the footnote.

And then the decision goes on to state, quote, "There is no indication in the record that Ferand will be asked to sit in on interviews in the future. And it appears that there is no hiring expected to take place in the pallet job in the foreseeable future," end quote.

I would note that, in fact, and I credit Mr. Ferand, he has sat in on seven or eight interviews with applicants who were interested, as I understand it, in getting the job as the truck driver in the pallet department.

In any event, he recommended a number of people, that a number of people actually be hired. None, indeed were hired. And again he testified that he is on the first step of a three step hiring process.

So I find that that additional facts, those additional facts, don't materially alter the decision or would not materially alter the decision of the Regional Director in finding that the production technician is not a statutory supervisor.

With respect to a tidy products remedy, tidy products is a case which stands, among other things that are propositioned, that the General Counsel and/or the Charging Party Union can get certain litigation costs and other costs if a defense is put forth in defense of a ULP charge, is frivolous.

I'm not going to order a *Tidee Products* remedy. I think that the Respondent, while it certainly doesn't agree with—doesn't agree with

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the decision to include the production technician in the unit, and as a practical matter the only way to get that to a Court of Appeals for review is to have an 8(a)(5) unfair labor practice finding by the Board.

So and another factor is that there was evidence that I think Mr. Lee, in good faith, wanted to present. And I don't think it's enough to change the underlying decision. But I think he should have been given the opportunity to do it. And it didn't take very long at all.

In any event, based on the facts in this case, I find that Respondent violated Section 8(a)(1) and 8(a)(5) of The National Labor Relations Act when it refused the request to bargain in good faith with the Union about the production technician in the nonprofessional bargaining unit.

Okay. And I will be making a Recommended Order to the Board. And my Recommended Order would be that the Respondent, MCAR, Inc., its offices, agents, successors and assigned, shall cease and desist from refusing to recognize and bargain collectively with the Union as the exclusive collective bargaining representative of the employees in the appropriate unit.

In addition, I will order that they cease and desist in any like or related matter from interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

I will also recommend to the Board an order that the Respondent take the following affirmative action necessary to effectuate the policies of the Act: Namely that it recognize and on request bargain in good faith with the Union as the exclusive collective bargaining representative of the employees in the appropriate unit concerning wages, hours and other terms and conditions of employment.

That is that the—that the Employer, MCAR, Inc., bargain with the Union with respect to the nonprofessional unit as clarified, namely that it count in its number the production technician person.

Now, what I will do, when I get a copy of this decision, I will certify it to the Board with copies to all the lawyers. And I will attach—actually my certification will be what I will be sending to you.

But attached to it as Appendix A, will be this bench decision.

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As Appendix B will the Regional Director's Decision of September, '98. Appendix C will be the Board Order denying review of the Regional Director's decision in the UC Case. And Appendix D will be a notice to be posted at Respondent's facility.

And I think that's it. Is there anything else, Mr. McKinney, that you think needs to be put on the record, sir, that I—

MR. MCKINNEY: No, there's—

JUDGE LINSKY: —might have inadvertently left out?

MR. MCKINNEY: No. There is—I would like to discuss a little bit—

JUDGE LINSKY: You may, sir.

MR. MCKINNEY: You referenced twice the nonprofessional bargaining unit. And I understand that the Regional Director did reference those two units that were certified under the Pennsylvania Labor Relations Board.

But we also made clear, I believe, that the parties have merged those two units into one. And unless I'm mistaken, I believe it is the one unit that the Regional Director clarified.

MR. FINK: I think it's "all nonprofessionals."

MR. MCKINNEY: It's—

JUDGE LINSKY: Okay. Well I'm looking at the complaint. And in paragraph 8, I understood it just to refer to the nonprofessional employees unit and that that was the unit that the --

MR. FINK: Yeah, Your Honor, I think there had—there had, at one time, been some distinction between, I think, two segments of the unit. But the unit, the single unit that exists now is all nonprofessional. There aren't any professionals in the unit. So it's—it is accurately characterized as nonprofessional.

I think they once had a janitorial and a other nonprofessional or something like that. But it's—-

MR. LEE: Your Honor, the current unit is professional and nonprofessional.

MR. FINK: Are there professionals in there? Okay.

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JUDGE LINSKY: Okay. So there is one merged unit?

MR. LEE: Yes.

JUDGE LINSKY: Okay. And the only issue in this case was would the Respondent bargain in good faith with the—that one merged unit as clarified. And the only issue was the production technician, okay?

MR. LEE: That's correct.

MR. FINK: That's my understanding.

JUDGE LINSKY: Okay. So the order then will say that the—that the—this will be clarified when I issue, you know, my order certifying the bench decision to the Board, that there is one merged unit, and that one merged unit, the Respondent should bargain in good faith with and that one merged unit should include, as clarified, the production technician person.

Okay. Is there anything else, Mr. McKinney?

MR. MCKINNEY: No, Your Honor, I believe that's it.

JUDGE LINSKY: Mr. Fink?

MR. FINK: No, nothing. Thank you.

JUDGE LINSKY: Okay. Mr. Lee?

MR. LEE: No, sir. Thank you.

JUDGE LINSKY: Okay. All right. At this time, the record is closed.

(Whereupon the hearing was concluded at 4:40 p.m.)

APPENDIX B

DECISION, ORDER, AND CLARIFICATION OF BARGAINING UNIT

Upon a petition duly filed under Section 9(b) of the National Labor Relations Act, a hearing[1] was held before JoAnn F. Dempler, a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to me.[2]

Upon the entire record[3] in this case, the Regional Director finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction here.

3 American Federation of State, County and Municipal Employees, District Council 85, AFL–CIO (the Union or AFSCME), the Petitioner here, is a labor organization within the meaning of Section 2(5) of the Act.

The Union is the collective-bargaining representative of certain employees of MCAR (the Employer or MCAR) which the Union was originally certified to represent in two units by the Pennsylvania Labor Relations Board (PLRB) in Case PERA–R-12, 599-W on October 30, 1979, clarified in Case PERA–U-82–403W on October 27, 1982, and again clarified in Case

[1] The name of the Employer appears as amended at the hearing.

[2] Under the provisions of Sec. 102.67 of the Board's Rules and Regulations, a request for review of this decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 109914th St., N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by September 25, 1998.

[3] The Employer and the Union timely filed briefs in this matter which have been duly considered by me.

PERA–U–84-441-W on July 31, 1984. As clarified, those two units presently are described as:

> (1) All full-time and regular part-time professional employees, including but not limited to Caseworkers, Caseworker Trainees, Nurse I, Special Education Teachers I, Special Education Teachers II, and Special Education Teacher Associates; excluding Residential Director I, Caseworker Supervisor I, nonprofessional employees, management level employees, supervisors, first level supervisors, confidential employees and guards, as defined in the [Pennsylvania Labor Relations] Act.
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> (2) All full-time and regular part-time nonprofessional employees, including but not limited to Houseparent I, Houseparent II, Houseparent III, Activity Aide 1, Activity Aide II, Activity Aide III, Homemaker, Clerk Typist I, Clerk Typist 11, Teacher Aides and Emergency Relief; excluding professional employees, management level employees, supervisors, first level supervisors, confidential employees and guards, as defined in the [Pennsylvania Labor Relations] Act.

In the petition for unit clarification here, the Union described a single unit, listing the inclusions from both of the units described above. Since the Union was certified, the parties have had successive collective-bargaining agreements, the most recent of which is effective from January 1, 1998, through December 31, 1999. That document covers both the professional and nonprofessional units in a single collective-bargaining agreement but references the units as separately certified by the PLRB.

In the instant proceeding, the Union seeks to clarify a combined unit of professional and nonprofessional employees by including within it the recently created nonprofessional position of production technician. In support thereof, the Union contends that the duties of this position are not supervisory within the meaning of Section 2(11) of the Act, and, in fact, consist more of a realignment of job tasks previously performed by individuals in the nonprofessional unit as well as nonsupervisory tasks previously performed by Production Manager Mark Russell. The Employer, contrary to the Union, contends that the production technician is a supervisor within the meaning of Section 2(11) of the Act and therefore must be excluded from the unit. Moreover, the Employer contends that the NLRB should not assert jurisdiction in this matter inasmuch as all of the previous representation issues have been decided before the PLRB. In addition, the Employer contends that, should the NLRB assert jurisdiction here, the case should be deferred to the arbitration procedure. Aside from the supervisory contention, the Employer raises no other substantive objection to the inclusion of the production technician in the existing nonprofessional unit.

The Employer is a private, not-for-profit Pennsylvania corporation located in Mercer County providing various services to clients with mental retardation and/or developmental disabilities. MCAR, previously known as Mercer County Association for the Retarded, Inc., provides a variety of services to its clients, including vocational training, residential facilities, rehabilitation, and community employment. MCAR is overseen by an 11-member board of directors who are elected by ARC (Association for Retarded Citizens) of Mercer County, the parent organization of MCAR. The membership of the parent corporation is comprised of families of clients, concerned citizens, and any other individuals who choose to join the organization.

The main facility of MCAR is in Hermitage, Pennsylvania. There is also a workshop of MCAR in Greenville, Pennsylvania, which is only about 30 miles from Hermitage. The main facility consists of a main workshop, a furniture shop, and a pallet shop. Donna Nicastro is the director of vocational services at the Hermitage facility[4] Reporting to Nicastro is Production Manager Mark Russell, who has overall responsibility for the four production shops. There are nine activity aides[5] in the main workshop. Assisting Russell are Jerome Thomas, furniture supervisor, in the furniture shop, and Mr. Jaggers,[6] assistant production manager, in the main workshop and at the Greenville facility. Each activity aide oversees the work of about 15 clients. There are also two activity aides in Greenville, and two in the furniture shop. Each of those aides also oversees about 15 clients. Prior to July 1, 1998, there were two activity aides and one driver employed in the pallet shop. There were a total of about 15 clients in the pallet shop at that time.

Prior to July l, 1998, Dave Farrand and Don Roudybush, the two activity aides assigned to the pallet shop, and Ed Perich, the driver, reported directly to Russell. Farrand has been working at MCAR for 17 years; Roudybush has been there for 11 years. In the pallet shop, various business customers place orders to have pallets built to the size needed for their purposes. Until this summer, these orders were called in to Russell, who would send the order in memo form to Roudybush or Farrand. Russell also prepared the invoices for Perich to take on the deliveries. According to Russell, the amount of work for the pallet shop has increased steadily in the last few years. While the orders for the other workshop areas are, to some extent, seasonal, the pallet shop volume is constant throughout the year.

Inside the pallet shop, there are various types of machines needed to produce the product. The aides supervise the clients, who grind, cut wood, cut metal, and assemble the pallets. The aides assign, oversee, and check the clients' work. The aides also fill out a timesheet for each client, as well as for their own time. The activity aides also load the truck driven by Perich, who delivers the finished pallets to the customers who placed the orders.

According to Russell, the system in effect prior to July 1, 1998, had some inherent problems. While the furniture shop and the main workshop had Thomas and Jaggers to assist Russell in overseeing the activity aides, the employees in the pallet shop reported only to Russell. Because of his responsibility for the entire production at MCAR, at times Russell was unavailable to take calls, assign work, prepare invoices, take inventory, and generally oversee the flow of work in the pallet shop. As a

[4] The management personnel at Hermitage also oversee the Employer's operation in Greenville.

[5] The activity aides are also called floor supervisors. However, they do not supervise other employees of MCAR within the meaning of the Act. Rather, they supervise the activities of the clients who do the production work in the workshops.

[6] The record does not reveal Jagger's first name.

result, there were sometimes delays in communications between Russell and the employees in the pallet shop, which consequently resulted in delays in production and delivery. It was thus decided that Russell needed an intermediary to assist him with the work in the pallet shop. In 1998, a new position was developed for this purpose, posted with the job title "production technician."

Farrand applied to be the production technician and was offered the position, which he began on about July 1, 1998. Consequently, there is presently only one activity aide in the pallet shop. Currently, the Employer has no plan to fill the second activity aide position which Farrand vacated. In his new job, Farrand took over certain duties, some of which had been performed by Russell, and some of which had been done by Russell, Roudybush, and Farrand. Roudybush and Perich now give their timesheets to Farrand, whereas previously they turned them in to Russell. When customers call in with orders, they now speak to Farrand, who accepts the order, and passes on the assignment to Roudybush. The calls previously came to Russell, and either Russell or the two activity aides would schedule the work. Farrand is now responsible for taking inventory, a task previously shared by Russell, Farrand and Roudybush. Farrand also does the pricing on the costs of new orders, which he turns in to Russell, who in turn gives it to the sales manager. Another one of Russell's duties which is now performed by Farrand is the invoicing of deliveries and the scheduling of stops for Perich each day. Farrand instructs Roudybush in the loading of the delivery truck; in the past, Russell gave those instructions to Farrand and Roudybush.

With these changes in duties, Farrand received an increase in pay. His hourly rate increased by approximately 40 cents per hour. Roudybush and Perich now have little direct contact with Russell since Farrand's duties allow him to act as an intermediary for Russell. Farrand has never been asked to attend any management meetings, although he was once asked to sit in on an interview of an individual who was applying for a job on the cleaning crew, which is not part of the pallet shop. Although he is no longer responsible for the supervision of the clients who work in the pallet shop, Farrand does spend part of his time assisting Roudybush when needed.

I. THE JURISDICTIONAL ISSUE

As previously stated, the units at issue here were certified and then clarified by the PLRB. The Union, by filing the instant petition, requests that the NLRB assert jurisdiction in the matter. The Employer, contrary to the Union, contends that jurisdiction should be declined by the NLRB and that all representation issues should be resolved by the PLRB, as has always been done in the past.

In support of this position, the Employer argues that the parties have a long history of a stable bargaining relationship under the jurisdiction of the PLRB, and that nothing has changed jurisdictionally to justify disturbing this relationship. Thus, the Employer contends that jurisdiction should remain with the PLRB because there is no compelling reason to change it. I find the Employer's argument unpersuasive. After the Board's decision in *Res-Care, Inc.*, 280 NLRB 670 (1986), the Board's policy was to decline jurisdiction in certain cases, based on the relationship between the employer and the exempt entity for which it was providing services. Consequently, in 1988, when the Union filed a charge with the NLRB against MCAR, the Regional Director dismissed the charge, noting that, based on the policies set forth in *Res-Care, Inc*., supra, the Board would decline to assert jurisdiction over the Employer.[7] However, in 1995, the Board overruled *Res-Care* in *Management Training Corp.,* 317 NLRB 1355 (1995). Thus, Board policy changed so that the NLRB would henceforth assert jurisdiction in certain situations in which it had previously declined to assert jurisdiction. Instead of the standards set forth in *Res-Care,* supra, to decide whether or not the Board would assert or decline jurisdiction in such cases, the Board held that the sole determining factor in making this decision would be whether or not the employer meets the definition of "employer" within the meaning of Section 2(2) of the Act and the applicable monetary jurisdictional standard. *Management Training Corp*., supra at 1358. Two later charges that were filed by the Union with the NLRB against MCAR in 1991 and 1993 were dismissed on the merits, but it was noted in the dismissal letters that it appeared the Board would now assert jurisdiction over the Employers.[8]

The Employer's argument that merely because the Board declined jurisdiction in the past, it should continue to do so, is unconvincing. The Employer argues that the parties have always enjoyed a "stable bargaining relationship" which has always been controlled by the PLRB and therefore it should stay that way. However, the stable bargaining relationship has been between the Employer and the Union, not the Employer and the PLRB. There is every expectation that the stable bargaining relationship can continue regardless of which agency exercises jurisdiction over the Employer.[9] Thus, the assertion that this matter should remain within the jurisdiction of the PLRB because the Employer has historically been under that agency's jurisdiction is not persuasive.[10]By filing the instant petition, the Union is requesting that

[7] That letter was received into the record as Jt. Exh. 3.

[8] Those dismissal letters were received into the record as Jt. Exhs. 4 and 5.

[9] The Employer cites D & T Limousine Service, 320 NLRB 859 (1996), in support of is position that the Board should not assert jurisdiction in this case. I find that the Employer's reliance on this case is misplaced. In that case, the employer believed that the Board should decline jurisdiction because it contended that the National Mediation Board could assert jurisdiction in the matter. In that case, the Board did assert jurisdiction because the employer failed to show that there had been a jurisdictionally significant change in the employer's operations and it fit the definition of an employer within the meaning of the Act. Thus, both the factual and the legal issues in that case are different than the situation here, where the Board had previously declined to assert jurisdiction, but because of a change in jurisdictional standards, can now assert jurisdiction. The instant case rests on the change in the Board's standards for asserting jurisdiction, while D & T Limousine Service deals with the issue of alleged changes in the employer's operations.

[10] The Employer argues that the instant case is distinguishable from the situation in Community Interactions-Bucks County, Inc., 288 NLRB 1029 (1988), which the Employer acknowledges is an. operation that is quite similar to that of MCAR. The Employer asserts that the instant case is different from Community Interactions inasmuch as

the NLRB assert jurisdiction herein, and, so long as the Employer meets the definition of an employer within the meaning of the Act and the applicable monetary jurisdictional standard, I find no reason to decline jurisdiction herein.

The parties "have stipulated that the Employer is a health care institution within the meaning of Section 2(14) of the Act. The Board has found that employers such as MCAR which provide residential care and training to the mentally retarded fall within the definition of a health care institution within the meaning of the Act. *Beverly Farm Foundation, Inc.*, 218 NLRB 1275 (1975). Thus, I find MCAR to be a health care institution within the meaning of Section 2(14) of-the Act. The parties also stipulated that MCAR meets the applicable monetary standards for the assertion of jurisdiction as a health care institution. Moreover, the Employer agrees that its operations are substantially similar to the operations of the employer in *Community Interactions-Bucks County, Inc.*, supra, a case in which the Board asserted jurisdiction over such an employer.

Thus, it is clear that MCAR is an employer within the meaning of the Act. Despite the fact that the units involved here were originally certified by the PLRB, I find that the Employer meets the appropriate monetary jurisdictional standard as a health care institution, is subject to the Board's jurisdiction and that there is no basis for declining to exercise jurisdiction over the Employer. Accordingly, I find that it is appropriate to assert jurisdiction in this matter.

II. THE DEFERRAL ISSUE

At the hearing in this case, the Employer raised the argument that a grievance has been filed over the issue of whether the production technician's duties belong in the bargaining unit, and therefore, the matter should be deferred to the arbitration process. Contrary to the Employer, the Union argues that the matter should not be deferred to arbitration. I find that deferral would not be appropriate in this matter.

Although infrequent, the Board has, in some cases, deferred to arbitration in a representation proceeding. However, this is only done in cases where the resolution of the underlying issue turns solely on the proper interpretation of a collective-bargaining agreement. *St. Mary's Medical Center*, 322 NLRB 954 (1997). When the resolution of the issue turns on statutory policy, the Board will not defer to arbitration. Id., citing *Marion Power Shovel*, 230 NLRB 576 (1977).

In the instant matter, there does not appear to be any issue that can be resolved through interpretation of the collective-bargaining agreement. Rather, apart from jurisdiction, the underlying issue involves the statutory inquiry of whether or not the position of production technician should be excluded from the nonprofessional unit as possessing supervisory indicia within the meaning of Section 2(11) of the Act. Accordingly, the issue here is a statutory one and should not be deferred to the arbitration procedure.

III. THE SUPERVISORY ISSUE

As previously noted, the Union filed the petition in the instant proceeding requesting that the present unit as described by the Union be clarified to include the newly created nonprofessional position of production technician. Contrary to the Union, the Employer contends that the production technician must be excluded from the unit on the basis that the duties of the production technician are supervisory, particularly with regard to the direction of work.

Section 2(3) of the Act excludes supervisors from the definition of "employee." Section 2(11) of the Act further defines a supervisor as "any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

The Board has been careful not to construe the language of the statute relating to supervisory status too broadly because once an individual is found to be a supervisor, that individual is denied the rights of employees which are protected by the Act. *St. Francis Medical Center-West*, 323 NLRB 1046 (1997); *Hydro Conduit Corp*., 254 NLRB 433, 437 (1981). "In enacting Section 2(11), Congress emphasized its intention that only truly supervisory personnel vested with 'genuine management prerogatives' should be considered supervisors, and not 'straw bosses, leadmen, setup men and other minor supervisory employees.'" Id., quoting *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985), affd. in relevant part 794 F.2d 527 (9th Cir. 1986). The exercise of some supervisory authority in a manner which is merely routine, clerical, perfunctory or sporadic, does not confer supervisory status. Id. at 1609.

As a result, the Board analyzes each case individually "in order to differentiate between the exercise of independent judgment and the giving of routine instructions, between effective recommendation and forceful suggestion, and between the appearance of supervision and supervision in fact." *Providence Hospital*, 320 NLRB 717, 725 (1996), citing *McCullough Environmental Services*, 306 NLRB 565 (1992), enf. denied 5 F.3d 923 (5th Cir. 1993). Further, the burden of proving supervisory status in a representation case rests on the party alleging that supervisory status exists. *St. Francis Medical Center-West*, supra. When the evidence is in conflict or inconclusive with regard to a particular indicia of supervisory status, the Board will not find supervisory status based on that indicia. *Davis Memorial Goodwill Industries*, 318 NLRB 1044 (1995); *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

Applying the above principles to the instant case, I find insufficient evidence to warrant a conclusion that the duties of the production technician are supervisory within the meaning of the Act. There was no evidence at all presented that Farrand, in his new position, has any authority to transfer, suspend, lay off, recall, promote, discharge, assign, or reward employees. With

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that case involved a new representation case, while MCAR has a long history of being certified under the PLRB. I do not find this distinction to have any probative significance. The fact that the instant unit has been certified for a long time while the one in Community Interactions was newly certified does not affect the disposition of the jurisdictional issue in any way.

regard to the Employer's hiring process, while Farrand was asked to sit in on one job interview, this related to an applicant for a job in another department and there is no evidence that Farrand's opinion was considered in the decisionmaking with regard to that applicant.[11] There is no indication in the record that Farrand will be asked to sit in on interviews in the future, and it appears that there is no hiring expected to take place in the pallet shop in the foreseeable future.

Farrand stated that he might someday sit in on grievance meetings; however this assertion was vague and speculative. The Union has been certified at the Employer's facility for about 20 years, and none of the witnesses could recall a single grievance ever having been filed.

Likewise, Farrand testified that he might report a discipline problem to Nicastro if the occasion ever arose. There is no indication, however, that should such a situation arise, Farrand's opinion or recommendations regarding discipline would be solicited or followed. Such speculation is not probative of supervisory status.

The thrust of the Employer's argument relating to supervisory status is that Farrand directs the work of Roudybush and Perich in the pallet shop. In this regard, Farrand has been assigned some of the duties formerly performed by Russell, which Russell was frequently too busy with other aspects of production to handle efficiently. Farrand also assumed the sole responsibility for certain duties formerly performed by himself and Roudybush. However, none of Farrand's current duties appear to involve the necessary independent judgment required for a finding of supervisory status. Farrand now receives the phone calls from business customers who wish to place orders for clients. He passes these orders on to Roudybush. He takes inventory of the supplies and stock of pallets in the shop. Farrand prepares the invoices and informs Perich of the deliveries that need to be made that day, and in which order the deliveries should be made. Farrand receives and reviews the timesheets, but if he observes an error, he merely informs Nicastro; he does not handle it himself. Farrand also spends about 10 percent of his time performing duties along with Roudybush, overseeing the work performed by the clients in the pallet shop.

In sum, the record reveals that, although Farrand has been given different job duties than he previously had as an activity aide, with a raise in pay of about 40 cents per hour, his new job duties do not confer supervisory status on him. His new duties appear to be a rearrangement of certain duties previously performed by either Russell, Roudybush, and/or Farrand. Nonetheless, these new duties appear to be lacking in supervisory authority. These duties allow Russell more time to perform his supervisory and management functions by having Farrand as an intermediary, or conduit, for his directives. This was done to allow for more efficient production, since Russell was sometimes unavailable in the pallet shop. However, the assignment of work and other duties assumed by Farrand are clearly routine and clerical in nature. Both Roudybush and Perich are long time employees who appear to need little direction other than informing them of what order has come in or what delivery is ready for the day. There is insufficient evidence that any independent judgment is used in the performance of such duties.

In summary, the Employer has not met its burden of establishing that the production technician duties are supervisory as defined in the Act. In analyzing the various incidents asserted to show supervisory authority, I find that in each instance the record fails to establish anything more than merely routine, perfunctory, or, at best, sporadic events. The exercise of such limited authority is insufficient to confer supervisory status. *Delta Mills, Inc.,* 287 NLRB 367 (1987*); Bowne of Houston. Inc.*, 280 NLRB 1222 (1986). Accordingly, I find that the production technician is not a supervisor within the meaning of Section 2(11) of the Act and I shall clarify the existing nonprofessional unit to specifically include therein the newly created nonprofessional position of production technician.[12]

ORDER

It is ordered that the existing nonprofessional unit represented by American Federation of State, County and Municipal Employees, District Council 85, AFL–CIO be, and it is, clarified so as to include therein the position of production technician.

[11] In fact, the record indicates that a decision has not yet been made with regard to that applicant. The interview in which Farrand took part was only the first of three interviews conducted before a decision is made on the applicant.

[12] As discussed previously, the Union was certified by the PLRB to represent MCAR's employees in two separate units, and the two units were twice clarified by the PLRB. The two units consisted of one unit of professional employees and one unit of nonprofessional employees. Although the instant petition describes one combined unit, and the current collective-bargaining agreement covers both units in one contract, the record does not reflect that there has ever been an election held in order for the professional employees to vote as to whether or not they wished to be included in a unit with the nonprofessionals. Therefore, I shall clarify only the nonprofessional unit at this time to include the position of production technician.

The parties have submitted, as a joint exhibit in this matter, a description of the two units with the job titles as they presently exist. Accordingly, the clarified units, with the updated job titles, are as follows:

PROFESSIONAL UNIT: All full-time and regular part-time professional employees, including Vocational Program Specialists and Wrap Around Workers employed by the Employer at its Hermitage, Pennsylvania and Greenville, Pennsylvania, facilities; excluding all nonprofessional employees, management employees, confidential employees and guards, and supervisors as defined in the Ad.

NONPROFESSIONAL UNIT: All full-time and regular part-time nonprofessional employees, including Accounts Receivable/Payable Technicians, Crew Leaders, Drivers, Fiscal Assistants, Floor Supervisors. Floor Supervisors II (Food Service, Furniture Shop, Pallet Shop), In-Home Residential Aides, Individual Specialized Program Implementors, Job Coaches, Maintenance Technicians, OBRA Companions, production technician, Receptionists and Residential Workers, employed by the employer at its Hermitage, Pennsylvania and Greenville, Pennsylvania facilities; excluding all management employees, confidential employees and guards, professional employees and supervisors as defined in the Act

APPENDIX C

ORDER

The Employer's request for review of the Regional Director's Decision, Order, and Clarification of Bargaining Unit is denied as it raises no substantial issues warranting review. In denying review, we note that the Employer's reliance on the Third Circuit's decision in *Passavant Retirement & Health Center v. NLRB*, 149 F.3d 243 (3d Cir. 1998), enf. denied 323 NLRB 598 (1997), is misplaced. In its decision, the court specifically stated that it was "not creating a per se rule that LPNs are supervisors." 149 F.3d at 249. Further, the record in that case, unlike the facts before us in the instant case, contained specific evidence, relied on by the court in finding the LPNs to be statutory supervisors, that the LPNs had the authority to discipline employees and adjust grievances in the exercise of their independent judgment.

MEMBER HURTGEN, dissenting.

I would grant review on the jurisdictional issue and on the supervisory issue.

With respect to the former, I note that NLRB jurisdiction over the Employer has previously been declined, and that a State Board has exercised jurisdiction. Although the declination preceded *Management Training Corp.*, 317 NLRB 1355 (1995), I have said that I do not necessarily agree with that case. See *Correctional Medical Services*, 325 NLRB 1061 (1998). Accordingly, I would grant review.

With respect to the supervisor issue, I note that there is at least some evidence that the person in dispute has *authority* to make effective recommendations in regard to hiring, adjustment of grievances, and assignment and direction of employees.